

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Palestine, Texas

WAL-MART STORES, INC.

Employer

and

Case No. 16-RC-10181

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 455

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds: 1/

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/
3. The labor organization involved claims to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 4/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time employees employed in the meat market area and seafood department at the Employer's retail store located at 2223 South Loop 256, Palestine, Texas.

EXCLUDED: All other employees, including meat department associates assigned to the "97 Wall", meat/seafood/deli department manager, office clerical employees, professional employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION^{5/}

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a

strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the United Food and Commercial Workers Union, Local 455.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list containing the full names addresses of all eligible voters which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); and *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 16 Regional Office, 819 Taylor Street, Federal Office Building, Room 8A24, Fort Worth, Texas 76102, on or before March 21, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington D.C. by March 28, 2000.

DATED March 14, 2000, at Fort Worth, Texas.

/s/ Claude L. Witherspoon
Claude L. Witherspoon, Acting Regional Director
NLRB Region 16

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1. The Employer and the Petitioner filed briefs which were duly considered.
 2. The parties stipulated, and I find, that Wal-Mart Stores, Inc. is a Delaware corporation with offices and places of business located throughout Texas where it engages in the business of retail merchandising. The facility involved in this proceeding is a store located in Palestine, Texas. During the past 12 months, a representative period, the Employer has purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Texas and has derived gross revenues in excess of \$500,000.
 3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
 4. Petitioner seeks to represent all full-time and part-time meat processors, meat associates, and seafood associates who work in the Employer's meat and seafood markets at its Palestine, Texas store. The Employer takes the position that the unit sought by the Petitioner is inappropriate and urges that the only appropriate unit should include all store associates. The Employer has also filed a Motion to Dismiss the petition. There are approximately fifteen employees in the unit sought by the Petitioner and approximately 400 in the unit urged by the Employer.

The Palestine store is considered a supercenter facility for the Employer. In its operation, the store is divided into general areas of merchandise which include hardlines (health and

beauty aids, cosmetics, paint, hardware, automotive), homelines (bedding, housewares), softlines, and foods. The foods area includes meat, seafood, deli, produce, dairy, grocery, and bakery departments. The other three general areas of merchandise encompass departments that are broken down by product groups such as housewares, clothing, health and beauty aids, electronics, paint, hardware, garden center, furniture, sporting goods, automotive, photo center, pharmacy, and vision center.

Ron Stacy is Store Manager of the Palestine store and, in his position, he has overall responsibility for the store's operations and merchandise. Ray Brown is the Foods/Hardlines Manager and he has operational responsibility for the Deli, Meat, Seafood, Bakery, Produce, Groceries, Dairy, Chemicals, Domestics, Stationary, Housewares, Fabrics, Arts and Crafts, Risk Control and Frozen Foods departments. The Assistant Manager for the Foods product group is Bill Van Kampen. Van Kampen is responsible for the Groceries, Deli, Dairy, Frozen Foods, Meat, Produce, Bakery, and Seafood departments.

Prior to September 1999, the Meat and Seafood departments were managed together and were under different supervision from the Deli department. In September 1999, the Employer consolidated the Meat/Seafood departments with the Deli department and placed these departments under the same department manager for management and merchandising purposes. Larry Carroll is the manager of the Meat/Seafood/Deli department. In his position, Carroll is responsible for the supervision and daily management of the meat market, seafood market and deli employees and is responsible for ordering food products, overseeing and monitoring product inventory, preparing associate work schedules, making sure the grinder log is prepared, and handling price change and advertisement paperwork for all three areas.

Reporting to Carroll from the meat, seafood and deli areas are fifteen meat associates, three seafood associates, and fourteen deli associates. Of the fifteen meat associates, six are meat processors, three are meat wrappers, three are cleaners, and three are associates assigned primarily to an area known as the "97 Wall". Three associates are primarily assigned to the seafood market and fourteen sales associates are primarily assigned to the deli service area.

The Employer's food product departments are located in one general area of the store. The Bakery department is located next to an entrance on the grocery side of the store. Associates use this entrance when coming and going from work. Across from the Bakery department is the Produce department. In this area, leafy and refrigerated vegetables are stocked on display tables. Along the store wall next to the Bakery department is the Commercial Bread area. Adjacent to the Commercial Bread area and located in a corner is the Floral department and the Produce department prep area. Curving away from the Floral department along the store wall is the Seafood department.

The Seafood department consists of a seafood freezer and display case, which face the sales floor, and a seafood prep area situated behind a service counter. Present in the seafood prep area are a cooler, a freezer (stand-up), a table top wrapper, two scales, and a

lobster steamer. All frozen and boxed seafood products for the store are kept in the freezer and cooler when not in cases in front of the seafood service counter. Fresh cut Angus beef is displayed and sold in the seafood display case and is stocked by seafood associates and meat market associates. Seafood associates do not cut or process boxed meat or seafood. Behind the seafood prep area and along a corridor that runs parallel with the store wall is the Produce department stock area and a freezer shared by the Meat and Bakery departments. Produce dry goods, paper products, and chemicals are stored in this area. The record reflects that a small amount of cross-merchandising takes place in the Seafood department. On the seafood service counter are a scale and a few items from the Grocery department such as spices and dips that can be used with seafood products. Grocery department associates are responsible for refilling and stocking these cross-merchandise items.

The meat market is located next to the Seafood department. The meat market area consists of the meat holding area, the meat prep area, and the meat cooler. Boxed beef, boxed pork, prepackaged chicken, offals, prepackaged lunch meat, prepackaged sausage and bacon, and modified atmosphere packed (MAP) hamburger meat is stored in the meat cooler. A grinder machine is also located in this cooler. Along the wall in front of the meat prep area and reaching back towards the Seafood department are meat cases for fresh beef products, pork, ground beef, prepackaged poultry, and seafood products. Across from these meat cases are two bunkers filled with frozen and prepackaged beef and chicken items. Meat associates are primarily responsible for filling the fresh and frozen meat cases and maintaining these foods in the cooler and freezer.

Along the store wall adjoining the fresh meat cases are meat cases that comprise the “97 Wall”. The “97 Wall” is an area of cases stocked with prepackaged lunch meat, frankfurter, bacon, and sausage products. Prepackaged meat products from the “97 Wall” are also kept in two bunkers located on the sales floor across from the “97 Wall” meat cases. These bunkers typically contain “97 Wall” products such as sausage, bacon, and prepackaged smoked meats. There are three meat associates who are primarily responsible for stocking and maintaining the “97 Wall” cases and bunkers. Occasionally, the Meat/Seafood/Deli department manager will direct a meat associate from the meat market to assist the “97 Wall” meat associates with stocking these cases and bunkers.

The “endcaps” or ends of these bunkers typically contain dairy products or grocery items such as soft drink cans that are displayed pursuant to a store promotion. The stocking and refilling of these “endcaps” are the primary responsibility of the respective Dairy and Grocery departments. Directly behind the “97 Wall” meat cases and adjacent to the meat cooler is the deli freezer. Frozen fish, pastas, pizzas, and ice cream are kept in this freezer. Further along the store wall and next to the “97 Wall” are cases containing cheese products. These cases are stocked and maintained by the Dairy department. The last case along the store wall contains specialty cheese and drink products. This case is part of the deli service area and is stocked and maintained by the Deli department.

Across from the dairy cheese cases and an adjoining fire exit and hallway is the Deli department. The fire exit that separates these two areas is used by vendors to bring

products into the store and used by the grocery area for receiving purposes. Meat associates who are assigned to stock and maintain the “97 Wall” meat cases also use the exit. The Deli department is comprised of a deli prep area, deli service cases, and a deli service counter. At the far end of the deli service counter are the hot cases. These cases contain roasted and fried chicken products. Across from the deli service area on the sales floor are island bunkers that are used to display promotional items from the Deli and Dairy departments such as specialty cheeses, potato salads, crab salads, and other dinner items.

Meat and Seafood Associate Job Duties and Employment Conditions

Meat processors are responsible for cutting boxed meat, assisting in the stocking of meat cases, and handling prepackaged and frozen meat. The record reflects that meat processors spend at least 60 percent of their work time cutting boxed meat, including seaming and edging meat. One meat processor testified that he spent seven out of eight hours a day cutting meat and spent some time filling fresh meat display cases. In addition to the six meat processors who handle and cut boxed meat, the meat market is also staffed by three sales associates who are primarily responsible for wrapping meat cut by the meat processors. These meat wrapper associates spend 50 percent of their time wrapping, handling and stocking processed meat. The record reflects that meat wrappers are also responsible for rotating and/or removing meat based on its age and appearance. The record reflects that one deli associate occasionally wraps meat for the meat market area and occasionally helps stock some of the meat bunkers. Aside from this one employee, store employees in other departments do not assist meat wrapper associates with meat wrapping duties.

The Employer also employs in its meat market three associates who are responsible for cleaning the meat cases, counters and machines used by the meat processors and meat wrapper associates. These meat cleaner associates spend 50 percent of their time cleaning saws, grinders, tenderizers, and wrapping machines and cleaning floors, walls, and other areas of the meat prep room and coolers of the Meat department. Meat cleaner associates also spend approximately 25 percent of their time stocking and filling meat cases with meats processed in the store and approximately one hour per work day cubing and trayng processed meats. The record reflects that meat cleaner associates are proficient in taking apart and reassembling meat market equipment.

The record reflects three meat associates are primarily responsible for maintaining and stocking the “97 Wall” area. These meat associates routinely take prepackaged meat products from the meat cooler and place these products in the cases and bunkers located in the “97 Wall” area. In addition to stocking the appropriate cases and bunkers, the “97 Wall” associates are responsible for monitoring these cases and bunkers for out-of-date products, cleaning the “97 Wall” area, and making sure the cases and bunkers are presentable for customers. The record reflects that “97 Wall” meat associates do not cut, process, or wrap meat and do not have knowledge as to the different cuts of meat that are utilized by the Employer.

Seafood associates are primarily responsible for preparing seafood for display in cases, stocking these display cases, taking care of the seafood cooler and freezer, ordering seafood product for the coolers and displays, cleaning the seafood prep area, and performing customer service at the seafood service counter. The seafood that comes into the store is boxed and already filleted. When this boxed product comes to the store, seafood associates take the product out of the boxes and place them in either the cooler or display cases. As noted above, seafood associates also stock the seafood display case with processed Angus beef cut by meat processors. Seafood associates use steamers to steam lobster, shrimp and other seafood for customers. The record reflects that the sanitizing procedure used for cleaning knives and equipment is the same for the Produce, Seafood, Meat, Deli, and Bakery departments.

When a customer selects a seafood product, the seafood associate places the product on the scale on the seafood service counter and weighs it. The seafood associate inputs into the scale number pad the product look-up number (PLU) for the product. These numbers are located on the back of the price tags that are displayed in the seafood case for each respective seafood product and are in customer view. After the seafood associate inputs the PLU number, the scale weighs the product and prints out a label with its price and weight. The seafood associate uses a table top wrapper in the seafood prep area to hand wrap the seafood product and gives it to the customer with the printed price label on it. This product procedure and the use of PLU numbers is the same procedure used in the Meat and Deli departments. The record reflects that one of the two scales in the Meat department is the same as the scales used in the Deli and Seafood departments. One of the two scales in the Meat department that is on the automatic wrapper machine is similar to the other scales but has a second face pad not present on the Seafood and Deli department scales.

The record reflects that meat processors receive between \$12.17 and \$7.76 an hour in pay. There are four meat processors who have over fifteen years of prior meat cutting experience and these four meat processors make an average of \$11.17 an hour. The two remaining meat processors had no prior experience in handling meat when they began working in the Meat department but have had six months and one year of meat cutting training, respectively, since joining the department. The record reflects that both of these meat processors average \$7.47 an hour in pay. The record reflects that meat wrapper and meat cleaner associates are paid between \$8.11 and \$6.24 an hour and average \$7.20 an hour in pay whereas meat associates who work on the “97 wall” make between \$7.93 and \$6.68 an hour and average a pay rate of \$7.34 an hour. The record further reflects that seafood associates are paid between \$7.44 and \$6.00 an hour and, on average, make \$6.58 an hour. The record reflects that the highest paid hourly associate located outside of the Meat/Seafood/Deli department receives \$13.09 an hour whereas the lowest paid hourly associate makes \$5.40 an hour. The record further reflects that the average hourly wage received by these store associates is \$6.96 an hour and the median hourly wage is \$6.62.

All meat and seafood associates work approximately 40 hours per week. Meat processors and meat wrapper associates are generally scheduled to work shifts ranging

from 5:00 a.m. to 2:00 p.m., 9:00 a.m. to 6:00 p.m. and 10:00 a.m. to 7:00 p.m. Meat cleaner associates generally work shifts ranging from 12:00 p.m. to 9:00 p.m. and 1:00 p.m. to 10:00 p.m. Seafood associates generally work either a 7:00 a.m. to 4:00 p.m. or a 12:00 p.m. to 9:00 p.m. shift. Both meat and seafood associates wear white coats, red baseball style caps, and red aprons. Deli sales associates wear black aprons or blue smocks in their work area. Produce associates wear green aprons and bakery associates wear white clothing in their respective work areas. Both produce and bakery associates wear baseball style caps. All associates are required to wear name badges in their respective areas.

The meat market sells a variety of meat products that arrive at the store already processed. The store also receives boxed beef and pork of various weight and size. From a sales revenue standpoint, approximately 69 percent of the meat received by the store is prepackaged and approximately 31 percent is boxed beef and pork meat. Meat processors generally prepare “cutting lists” which are used to notify other meat processors how much and what type of meat needs to be cut. All boxed meat is labeled and meat processors remove the proper portions from the respective boxes as dictated by the cutting lists. Meat processors then slice, cut, and trim meat portions, package, label, and place it in one of the fresh meat cases on the sales floor.

Meat processors are responsible for cutting a panoply of meat portions such as round steaks, strips, roasts, stew meat, brisket, short and back ribs, center cut hams, pork roast, pork chops, and offals. Meat processors also cut T-bones, New York strips, ribeyes, top sirloins, porter houses, and filet mignon from Angus beef and these cuts are displayed in the seafood case in the Seafood department. The Angus beef cut by the meat processors is initially cut in the meat prep area. The record reflects that both meat processors and seafood associates are responsible for stocking and refilling the Angus beef display.

Some of the tools used by meat processors when cutting meat portions are 6” and 10” knives, band saws, tenderizers and grinders. Meat processors do not use cleavers, handsaws or tie pins. The record reflects that associates in Deli, Seafood, and Bakery departments use some of the same knives used by meat processors when handling the food products in their respective departments. The record reflects that store employees in other departments do not use any of the specialized cutting tools or any of the band saw, tenderizer and grinder equipment located in the meat market.

The parties have stipulated that meat processors possess and utilize specialized meat cutting skills when they process boxed meat. The record reflects that meat processors must be familiar with the angles to cut and trim meat and how to position meat so that the most efficient cuts may be obtained from each piece of boxed meat. When cutting meat, meat processors determine what pieces can be carved from the boxed portion they are handling. Mistakes in cutting can lead to wasted meat and cuts that would be sold at a lower price than it would otherwise be sold. Likewise, meat processors factor in what cuts will be physically appealing to customers on the sales floor. Meat processors also grind the trimmings resulting from their meat cutting into ground beef that is wrapped and put on the sales floor. During holidays such as Thanksgiving, Christmas, New

Year's and Easter, meat processors make specialty cuts such as slicing hams and other meats and preparing pork crown rib roasts. The employees in other departments do not cut or grind meat or operate meat market equipment.

All store associates attend daily store meetings when they are available to do so and attendees at these meetings participate in the Employer's cheer. These store meetings are held in different parts of the store each day. All associates are also required to observe the Employer's "Ten Foot Attitude" rule. This rule requires all store associates to greet and assist customers who come within ten feet of their person and escort them to the appropriate area for the products they are seeking. All associates participate in the Employer's safety incentive program without regard to where they are located in the store.

All store associates submit the same application and are subjected to the same hiring process. All job applicants must pass a drug test before they are eligible for hire by the Employer. The Employer does not require applicants for the Meat/Seafood/Deli department to have prior meat handling experience before they can be hired to work as a meat processor or a meat associate. All new associates go through the same general orientation process regarding the Employer's general policies and practices. All store associates are subject to the same rules and policies that are described in the Employer's Associate Handbook. All store associates receive training through the Employer's Computer Based Learning (CBL) system and receive CBL training that relates to storewide matters. Meat associates also receive CBL training that specifically pertains to the Meat department. The record reflects that these CBL training modules do not provide meat associates training regarding the different cuts of meat sold by the Employer or how to cut and process this boxed meat. Meat associates do not receive CBL training for any other departments. The Meat/Seafood/Deli manager is responsible for training all meat, seafood, and deli associates. The record reflects that aside from initial training and initial instruction in their respective work areas, the Meat/Seafood/Deli manager does not engage in hands-on training with these associates.

The record reflects that seafood associates and new meat associates are generally trained by more experienced seafood and meat associates. With regard to meat processors, the record reflects that these associates require special training to learn how to create meat cuts and how to use the meat cutting tools that are required for making these cuts. The record reflects that four of the six meat processors in the meat market area have over fifteen years of experience in handling and cutting meat. The record reflects that the other two meat processors in the Meat department have only one year and six months of meat cutting experience, respectively and have been assigned to work with the other experienced meat processors for a significant number of hours each work day for training purposes. The record further reflects that meat processors need at least a year and a half of meat cutting training before being able to handle significant meat cutting for the Employer and meat wrappers require at least six to seven months to learn their job duties.

Regarding leave of absence requests, all associates must submit these requests to their respective department manager. The department manager will make an initial

determination on whether to grant or deny the request. All store associates receive annual performance evaluations from their area managers through the same basic process and completed performance evaluations are reviewed and approved by the co-manager or the store manager. The skills evaluated in the performance evaluations vary based on where the associate works, but the percentage of annual raise received by an associate is based on the results of those evaluations in the same manner for all associates. An associate who receives a “meets expectations” evaluations receives a 4 percent raise, whereas an associate who “exceeds expectations” receives a 5 percent pay increase. The actual duties reviewed by managers in each area are unique to the individual area of the store and evaluation forms reflect these differences. When an associate is coached or commended for his or her performance, the coaching or commendation is reported to the Personnel department.

All store associates are eligible to participate in the Employer’s 401(k) plan, pension plan, stock purchase plan, stakeholder bonus plan, profit sharing plan and discount card program and all store associates are eligible for the same medical, disability, and life insurance benefit programs. All store associates park in the same lot, use the same two time clocks, use the same associate lounge, and use the same lockers. Store associates work different shifts throughout the day, but all work 8-hour shifts. The record reflects that 85 percent of store associates are considered full-time employees who work an average of 28 hours or more per week. All store associates are given two 15-minute breaks and a 1-hour lunch break. All store associates receive their paychecks from the same location in the store on paydays.

The record reflects that within the past six months, six employees have transferred into the meat market. One transferred associate began working as a meat wrapper associate in August or September 1999 and another began working as a meat processor in the meat market around this same time period. Three other associates began working as meat cleaner associates in February 2000 while another associate began working as a “97 Wall” meat associate during this same time period. The record reflects that none of these associates had any prior experience with handling meat, meat clean up or meat wrapping. The record reflects that one meat cleaner associate was transferred out of his position in the Meat department by the Employer in February 2000 to an overnight stocker position in the Grocery department. The record further reflects that the Employer transferred this associate from the Meat department because of this employee’s performance problems. Aside from this one transfer, the record does not reveal any other instances of meat market employees transferring to other store departments or other instances of store associates from other departments transferring into the meat market more than six months prior to the hearing in this matter.

Regarding interchange between meat market and seafood associates, the record reflects that meat processors take cut portions of Angus beef to the Seafood department on a daily basis. The record also reflects that both meat processors and seafood associates stock the Angus beef in the seafood case. When Angus beef in the seafood display needs to be restocked, seafood associates go to the meat market area and inform meat processors of the need for more Angus beef. Additionally, the record reflects that meat market

associates assist the Seafood department by servicing customers and filling seafood trays in the seafood display case when seafood associates are at lunch, on break or unavailable. The record reflects that this assistance arises by the Meat/Seafood/Deli manager directing meat market associates to relieve seafood associates or seafood associates approaching meat market associates and making a verbal request for assistance. Likewise, the record reflects that seafood associates fill Meat department bunkers and cases and straighten up the meat counter. One meat processor testified that he observed one seafood associate wrapping processed meat for him in the meat market prep area two to three times a day.

The record also reflects that meat market associates occasionally assist “97 Wall” meat associates with stocking the cases and bunkers in the “97 Wall” area. The record does not reflect “97 Wall” meat associates assisting meat market associates with their job duties. The record reflects that although “97 Wall” meat associates and deli associates occasionally assist each other with filling their cases and bunkers, there is little interaction between these associates. The record does reflect evidence that one deli associate has assisted meat market and seafood associates with wrapping, stocking and cleaning. Notwithstanding the occasional assistance provided by this deli associate, there is no other record evidence of deli associates working with meat and seafood associates or meat and seafood associates working with deli associates. Regarding associates from other departments, the record reflects that on occasion, associates from the general merchandise departments have assisted Meat/Seafood/Deli associates by pulling products from delivery trucks and helping these associates with reorganizing supply areas. The record does not reflect any evidence demonstrating that meat market or seafood associates have provided assistance to other store departments.

In determining whether a petitioned-for unit constitutes an appropriate unit, the Board applies a community of interest test. When applying this test to meat department units, the Board examines factors such as **1)** the portion of the employer’s meat department business involving boxed meat; **2)** the level of specialized meatcutting skills required to process the boxed meat; **3)** the level of training of meatcutters; **4)** the portion of the unit engaged in skilled meatcutting work; **5)** separate supervision; **6)** the degree of interchange and transfer between the meat department and the rest of the store; and **7)** the wages and benefits paid to the meat department employees. *Scolari’s Warehouse Markets, Inc.*, 319 NLRB 153, 158 (1995); *Super K-Mart Center*, 323 NLRB 582, 586 (1997). None of these factors, individually, is determinative; all are weighed in deciding whether a sufficient community of interest exists so as to include separate, identifiable groups of employees in an appropriate unit. Further, the Act allows a union to petition for an appropriate unit, and does not require it seek the most appropriate unit, even when a different than petitioned-for unit might be more appropriate. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Omni-Dunfey Hotels, Inc.*, 283 NLRB 475 (1987); *Federal Electric Corp*, 157 NLRB 1130, 1132 (1966). Upon consideration of all these factors and the entire record, I find that the meat market and seafood associates have a community of interest separate from those of other store associates and constitute an appropriate unit found herein.

The record reflects that 31 percent of the Employer's meat sales are derived from boxed beef and pork. This high percentage reveals that over one third of the Employer's meat market sales is dependent upon meat processors processing beef and pork for customer sale. More importantly, this percentage of boxed meat sales is comparable to percentages of boxed meat sales found to be a substantial portion of an employer's meat department business in *Scolari's Warehouse Markets, Inc.*, 319 NLRB at 157 and *Super K-Mart Center*, 323 NLRB at 587. Record evidence also shows that meat processors spend between 60 percent to 88 percent of their time at work cutting, seaming, and trimming boxed beef and pork. Clearly, these percentages reflect that meat processors spend a majority of their work time handling and cutting boxed meat, particularly when compared to the time meat processors spend meatcutting at other stores of the Employer. *See, e.g., Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 2.

The record reflects, and the Employer does not dispute, that meat processors possess and utilize specialized meatcutting skills when they process boxed beef and pork at the store. More particularly, the record evidence shows that meat processors use various angles when cutting portions of beef and pork. It is likewise not disputed in the record that meat processors must determine what pieces can be and need to be carved so that the most select cuts and a maximum profit can be obtained from the boxed meat. The record reveals that meat processors must exercise their meatcutting skills efficiently in order to avoid mistakes in cutting because such mistakes can lead to wasted meat and less favorable prices and profits for the Employer. Further, the evidence demonstrates that meat processors must determine what cuts will be physically appealing to customers when factoring what cuts should be obtained from a portion of fresh beef or pork.

During holidays throughout the year, customers place orders and make requests for meat processors to custom cut fresh meat products. Such custom meatcutting may include meat processors preparing crown roasts or carving hams. Given the skill required to make these specialty cuts and the time spent on obtaining these and cuts that are made on a daily basis, the evidence reflects that meat processors routinely apply highly specialized meatcutting skills on a consistent basis. *Super K-Mart Center*, 323 NLRB at 587. The record is clear that other store associates do not use the special knives or meat cutting equipment that meat processors use in the meat prep area. Although associates in the Deli, Produce, Bakery, and Seafood departments use some of the knives found in the Meat department, the evidence reveals that meat processors use other knives, tools, and equipment in the Meat department that are unique to their meat cutting needs and only found in the Meat department.

The amount of training required for meat processors has also been found to be an indicator of skill complexity. The record reveals that four of the six meat processors at the Palestine store have over fifteen years of meatcutting experience. Although the two remaining meat processors have a year and a half of training between them, the record evidence indicates that these two meat processors are still being trained, namely paired with more experienced meat processors for a significant portion of their work day. Moreover, the record reveals and the Employer does not dispute that these two meat processors require at least a year and a half more training before they can be proficient

enough to handle significant meatcutting responsibilities. The high level of experience and necessary training reflected by this record evidence shows that meat processors require a high degree of skill to perform their duties. *Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 6, *Super K-Mart Center*, 323 NLRB at 587.

The record establishes that approximately 40 percent of the employees in the petitioned-for unit are meat processors. This percentage reflects that a substantial portion of the unit engages in skilled meatcutting work. *Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 6, *Super K-Mart Center*, 323 NLRB at 588. More importantly, record evidence shows that only meat processors cut and process boxed meat. In sum, the evidence demonstrates that a significant portion of the proposed unit exercises “skills which are distinct from the skills” of other store associates while using equipment unique to the department. *Scolari’s Warehouse Markets, Inc.*, 319 NLRB at 156; *Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 4. It is not necessary to find that meat processors must exercise the full range of traditional meatcutting craft skills to constitute an appropriate unit. *Super K-Mart Center*, 323 NLRB at 586. What is required is that the meat processors perform separate and distinct skills from other employees. *Id.* at 586. The record shows that meat processors exercise these separate and distinct skills to a high degree. Hence, the evidence demonstrates that meat processors exercise a high level of meatcutting skills.

Regarding employee interaction, the record reflects meat market and seafood associates interact on a daily basis. Much of this interaction is attributed to coordination of Angus beef being processed and cut by meat processors in the meat prep area in the meat market and the displaying of this processed beef in the seafood market display case in the Seafood department. The record reflects that meat market associates also assist seafood associates by servicing customers and filling seafood meat cases when seafood associates are at lunch, on break, or generally unavailable. Likewise, record evidence reflects that seafood associates help fill meat cases in the meat market area. Hence, the evidence demonstrates that meat market and seafood associates enjoy a high degree of interaction in performing their daily work duties.

The record does not reflect, however, that meat market associates interact with other store employees, including meat associates primarily assigned to the “97 Wall”. Essentially, the evidence shows that meat market associates spend a majority of their time in the meat market performing meat-processing functions. The evidence also shows that although meat market associates will occasionally assist “97 Wall” meat associates in stocking the “97 Wall” area, the “97 Wall” meat associates do not in turn work in the meat market area. The record evidence does show that one deli associate occasionally wraps meat and stocks meat cases in the meat market and that on one occasion general merchandise employees helped reorganize Meat department supply areas. Notwithstanding these isolated instances of interaction, the record is bereft of any other evidence demonstrating that associates from departments other than Seafood department work in the meat market or meat market associates work in other store departments.

In its brief, the Employer contends that meat market associates and associates located throughout the store substantially interact with each other at general store meetings, in the employee lounge, at the employee time clocks, at common store entrances, when picking up their paychecks, and through common cross-merchandising efforts. While the foregoing demonstrates interaction between meat market employees and other store employees, this level of interaction is not considered substantial. *Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 5; *Super K-Mart Center*, 323 NLRB at 588. Moreover, these types of daily contacts are of the type that occurs in every situation where numerous employees work under one roof. *Super K-Mart Center*, 323 NLRB at 588. With regard to the cross-merchandising, record evidence shows that the interaction that results is limited. More importantly, such interaction has not been found “sufficient to negate the separate community of interest of the meat department employees.” *Id.* at 588.

Likewise, record evidence demonstrates a limited number of permanent transfers associated with the Meat department. In its brief, the Employer asserts that it is common for associates to transfer in and out of the Meat department. The record does not support this assertion. Of the six associates who have transferred to the Meat department within the last six months, four of these transfers took place two to three weeks prior to the hearing in the instant matter. Further, the record is devoid of any evidence of associates from other departments transferring into the Meat department prior to the past six months. The record does reflect one instance of a meat market cleaning associate who was transferred to the Grocery department. Again, the evidence reveals this transfer took place just a few weeks prior to the hearing. Likewise, there is no evidence in the record of any other meat market associate transferring out of the Meat department. Aside from these transfers, the degree of interchange between meat market associates and associates in other departments is not substantial. *Super K-Mart Center*, 323 NLRB at 588.

Although the record reveals that all employees are eligible for similar benefits and bonuses and subject to the same employee handbook, the record shows that meat processors are paid at a rate significantly higher than the wage rate paid to other sales associates. Specifically, the evidence shows that on average, meat processors make \$9.94 an hour, whereas the average for the rest of the store is \$6.96 an hour. This disparity in wages between meatcutters and other store employees has been found by the Board to be a significant factor establishing the meatcutters’ separate community of interest. *Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 4; *Super K-Mart Center*, 323 NLRB at 588. This wage disparity becomes even greater when only factoring the four meat processors who have over fifteen years of meat cutting experience. Although the two remaining meat processors are paid on average almost \$4.00 less per hour than the four other meat processors, this lower rate of pay is consistent with their not performing the same degree of cutting as their fellow experienced meatcutters.

In its brief, the Employer argues that meat processors and other store associates receive comparable wages and that wage disparities that do exist are far less significant than those found in *Scolari* and *Super K Mart Center*. Even if meat processors were not the highest paid employees in the store as the Employer asserts, such a factor does not

outweigh the high wage rate paid to meat processors as compared with the general store population. *Wal-Mart Stores, Inc.*, 328 NLRB No. 126, slip op. at 4. Such a high level of wages being paid to meat processors suggests that the Employer values their abilities more highly than associates who do not cut meat. *Scolari Warehouse Markets, Inc.*, 319 NLRB at 157.

The foregoing evidence demonstrates that the six meat associates who perform meat wrapping and meat market cleaning duties, respectively, and the three seafood associates should be included in the unit found appropriate herein. The meat wrapper associate wraps meat that is cut by the meat processors. The meat cleaner associate cleans all of the counters, bins, tools, and equipment used by the meat processors. As discussed above, seafood associates interact daily with meat processors as a result of processed Angus beef being displayed in seafood cases in the Seafood department. Additionally, all meat wrapper, meat cleaner and seafood associates fill meat cases in the meat market with the meat cut and processed by meat processors. Based on their day to day work duties, the record shows that these three associate groups are fully and functionally integrated with the meat processors in the operation of the meat market. *Super K-Mart Center*, 323 NLRB at 588. All of these associates “take the flow of work from the meatcutters” and perform supporting and ancillary functions to meat processors in making the overall product available to the customers. *Id.* at 588.

While common benefits and bonuses among all store employees or the common supervision of the meat market and deli employees might form the basis for finding a broader unit appropriate, if sought, it is the Employer who must establish that the petitioned-for narrower unit is inappropriate. *Executive Resource Associates, Inc.*, 301 NLRB 400, 402 (1991); *Omni-Dunfey Hotels, Inc.*, supra. Based on the above and the record as a whole, I find the record evidence offered by the Employer does not establish that the petitioned-for unit is inappropriate and I find that there is a sufficient community of interest to require the inclusion of the meat market and seafood associates in the unit sought by the Petitioner. Although the evidence reflects there is general interaction among store associates and that all associates share common benefits and bonuses, these considerations do not outweigh the distinct skills and functions exercised by meat processors when they process and cut boxed beef and pork for sale to store customers. Accordingly, I find that the petitioned-for unit is appropriate.

Employer’s Motion to Dismiss the Petition

In its brief, the Employer references a Motion to Dismiss it filed just prior to the opening of the February 28, 2000 hearing in this matter, a motion it reintroduced at the hearing. The Employer contends that its plan to eliminate all meat processing at its stores across the country equates to a fundamental change in its operations that makes the meat and seafood market bargaining unit sought by the Union not appropriate. Specifically, the Employer asserts that recent industry changes have resulted in meat providers providing a full variety of fully prepackaged meats that only require retailers such as the Employer to store, display and sell the meat product. The Employer contends that it has been considering selling only prepackaged meat for several years and that, as a result of this

new direction in the industry, it has made a decision to implement a 100 percent case-ready meat program for all of its Supercenter stores.

The Employer asserts that upon full implementation of the case-ready program, all meat sold at its Supercenter stores will be prepackaged. The Employer contends that the case-ready program will result in no meat being processed or cut at any of its Supercenters or any meat processing equipment being used by the meat department. The Employer asserts that the case-ready meat that will be received at its stores from distribution centers will be ready for immediate display. The Employer maintains that the associates' only duties with respect to the meat will be to unload it from trucks into the cooler, weigh and price it, and put them on display counters. The record reflects that in February 1999, the Employer implemented a case-ready beef pilot program in five of its Supercenter stores in Arkansas and a case-ready pork program out of its distribution center in Bedford, Pennsylvania. The record further reflects that the pilot program is ongoing and that there are meat processors at these pilot program stores who are still cutting and processing Angus beef.

The Employer maintains it made the decision to implement an inclusive case-ready meat program because switching to only prepackaged meat provided customers with a better selection of safe, high quality meat. Moreover, the results of its case-ready pilot program in five Supercenter stores in Arkansas has produced favorable sales results because it provides the Employer with a more consistent distribution network of meat products, and because competitors are already moving toward case-ready products. The Employer represents that it reached a final agreement with a supplier, Iowa Beef Processors (IBP), in December 1999 to provide case-ready meat to one quarter of its Supercenters. The Employer contends that distribution centers in Clarksville, Arkansas and Temple, Texas were selected for initial case-ready program implementation purposes because these distribution centers were located within close proximity to IBP. The Temple, Texas distribution center serves the Employer's store in Palestine, Texas.

In further support of its Motion to Dismiss, the Employer asserts that as a result of its agreement with IBP, the case-ready program will be fully operational beginning May 15, 2000 at its Clarksville, Arkansas distribution center and June 19, 2000 at its Temple, Texas distribution center. The record reflects that the Employer is engaged in on-going discussions with other suppliers concerning case-ready meat. The record reflects that roll out of the case-ready program at these two distribution centers would affect 175 stores, including the Palestine store. The Employer argues that its decision to switch to case-ready meat will result in a substantial alteration to the work performed by the employees in the petitioned-for unit and a significant reduction (60 percent) in the unit workforce.

At the hearing, the Employer provided a copy of a letter it sent to Iowa Beef Processors (IBP) on December 29, 1999, a copy of internal memos discussing case-ready beef, pork, lamb and veal discussions with potential suppliers, and a copy of documents that details the case-ready meat program implemented in Arkansas. The IBP letter discusses some details related to IBP's agreement to begin sending prepackaged beef to the Employer's distribution centers in Clarksville, Arkansas and Temple, Texas. This document does not

reflect any specific dates as to when the case-ready beef will roll out of these distribution centers, nor is the document signed by IBP. Employer Vice President Peterson testified that the issues underlying the vendor agreement with IBP still needed to be worked out and that a vendor agreement had not been executed. The record reflects that arrangements to inform the associates at affected stores such as Palestine were not undertaken until just a few days before the hearing. A substantially similar petition was filed by the Union on December 28, 1999, involving a store operated by the Employer in Jacksonville, Texas. No evidence regarding the Employer's case-ready program was offered at the hearing that was held in that matter on January 12 and 13, 2000. One meat processor testified that he was not made aware of the Employer's intent to go to case-ready meat products until being so informed through hearing testimony. Peterson testified that no exact dates had been previously set or announced because of the need to work out precise and exact dates with IBP for the perishable products that would be involved with the changeover.

The Board has consistently held that the mere speculation as to the uncertainty of future operations is not sufficient to dismiss a petition or decline to hold an election. *Canterbury of Puerto Rico*, 225 NLRB 309 (1976); *Gibson Electric*, 226 NLRB 1063 (1976); *Wittman Steel Mills, Inc.*, 253 NLRB 320 (1980). Although the Employer maintains that it has a final agreement with IBP regarding case-ready beef, the evidence does not support this contention. Specifically, the December 29, 1999 letter to IBP raises questions as to whether the parties have any formal obligation to each other. First, although the Employer asserts that May 15, 2000 and June 19, 2000 are pinnacle dates for the implementation of its case-ready program, there are no specific dates detailed in the IBP letter indicating when the case-ready beef was going to be rolled out at Clarksville and Temple distribution centers. As the Employer represented at the hearing that specific and precise dates were essential because of the products being dealt with, it is improbable that it would rely on this letter to define all the terms of its proposed relationship with IBP.

Second, the document proffered by the Employer as representative of a final agreement is not signed by IBP. This lack of signature is even more troubling considering the Employer represents in the letter that it has unilateral authority to end its agreement with IBP at any time. Third, the Employer did not provide copies of any vendor agreements confirming either the May 15 or the June 19, 2000 roll out dates with IBP. The Employer acknowledged at the hearing that it did not yet have a vendor agreement with IBP and admitted there were details that still need to be worked out between the parties. Moreover, the Employer documented in its letter to IBP that although the parties had not reached agreement on the vendor agreement issue, the Employer was still maintaining that vendor agreement needed to be in place between the parties. Such comments by the Employer reflect that there were still critical details to work out between the parties. Fourth, the agreement referenced in the IBP letter is limited to one-year duration. In light of the Employer's representations of being fully committed to implementing its case-ready beef program, it is unlikely that it would keep product flow from such a significant source of case-ready beef under such restrictive time limitations if its intentions were not to have the option to cease completely all meat processing at its stores.

The Employer also points to its pilot program as being indicative of its intentions to permanently implement its case-ready beef program. Although this program reflects the Employer's interest in case-ready meat products, the record evidence reflects that the pilot program is ongoing and subject to continual change.

Based on the foregoing, record evidence does not establish there is sufficient certainty that the Employer will implement its case-ready program in the Palestine, Texas store. There remain significant unresolved matters associated with the Employer's announced elimination of all meat processing at its stores to enable me to conclude that its decision to use only prepackaged meat products will be implemented at a date certain.

The facts in the instant matter can be distinguished from cases such as *Hughes Aircraft Company*, 308 NLRB 82 (1992) and *Douglas Motor Corp.*, 128 NLRB 307 (1960), where the employers therein cited fundamental changes associated with the nature of their businesses as a basis for the dismissal of representation petitions. In *Hughes Aircraft*, the employer executed subcontract agreements that confirmed its decision to have outside contractors provide uniformed plant protection services. *Hughes Aircraft Company*, 308 NLRB at 83. Further, the employer in *Hughes* kept its guard workforce fully abreast of its intentions to lay them off, an element that is missing in the instant matter. *Id.* at 83. There is evidence herein that reflects that the first time meat market associates and seafood associates were informed of the Employer's intentions to implement a case ready program and eliminate meat processing at its Palestine store was the day the hearing in the instant matter opened. Moreover, while evidence was recently taken on a substantially similar petition on January 12 and 13, 2000, involving its Jacksonville, Texas store, the Employer offered no evidence of its plan to go to a case-ready system at this store.

In *Douglas Motors*, the employer announced that it had plans to subcontract the production of all of its products and was going to convert its operations into a warehousing and distribution center just after a petition for representation had been filed. 128 NLRB at 307-308. The employer in *Douglas Motors*, just as the employer in *Hughes*, had already executed certain subcontracts and was awaiting other signed production contracts. *Id.* at 308. The Board found that a fundamental change in the nature of the employer's business operations was certain enough to warrant dismissal of the petition. *Id.* at 309. In the instant matter, the record does not reflect any contractual obligations like the ones present in *Hughes* being placed upon the Employer to execute its announced plans.

Both of above-cited cases reflect fact patterns where agreements had been signed and executed, actions that evidenced definitive contractual obligations being placed upon the employers to execute its announced plans to fundamentally change their business operations. Here, the Employer has presented a letter that details what it understood the terms of an agreement were going to be regarding its case-ready product supply relationship. The letter reflects that there are details to be worked out, details that the Employer articulates to IBP. The lack of a vendor contract and the evidence there are

details that still remain unresolved between the parties creates uncertainty regarding the Employer's asserted plans to eliminate meat processing at its stores.

In its brief, the Employer cites *Bentson Contracting Company v. NLRB*, 941 F.2d 1262 (D. C. Cir. 1991) in support of its argument that the Board is required to consider the impact of substantial changes in an employer's operations on the appropriateness of the proposed unit. Although it was held in *Bentson* that unit determinations based on functional specializations that do not exist must be overturned, the facts in that case are distinguishable from the facts in the instant matter. First, the employer and three unions in *Bentson* had a prior Section 8(f) collective bargaining agreement relationship covering the employees in dispute. In the instant matter, the Union has filed a petition to represent a bargaining unit that has neither a prior history of collective bargaining nor any prior union representation. Second, and most importantly, as in *Hughes* and *Douglas Motor*, the *Bentson* case addressed the ramifications of a contract signed by the relevant parties. In the instant matter, no such contractual obligations have been demonstrated by the Employer.

The Employer also cites *Frito-Lay, Inc.*, 177 NLRB 820 (1969), in its brief in support of its argument that fundamental changes affecting the appropriateness of the unit warrant the dismissal of a representation petition. First, the matter in *Frito-Lay* dealt with events after an election had taken place and a bargaining relationship had been established, situations that have not taken place in the instant matter. Second, the certainty of whether the employer's restructuring was going to take place was not an issue in *Frito-Lay*. The facts in *Frito-Lay* reveal that such restructuring had taken place after an election had been held and the matter was before the Administrative Law Judge to determine whether the employer had committed unfair labor practices in failing to bargain with the union because of substantial changed circumstances. In the instant matter, the Employer has not yet entered into a binding agreement to eliminate meat processing at its Supercenter stores.

Therefore, based on the lack of evidence demonstrating the Employer's plans to implement a case-ready meat program at its Palestine store are certain, I shall deny the Employer's Motion to Dismiss. The Employer's stated intention of implementing an inclusive case-ready meat program at its Palestine, Texas store is too indefinite and too speculative a basis to bar an election. *Canterbury of Puerto Rico*, 225 NLRB at 309; *Gibson Electric*, 226 NLRB at 1063. *See also, Witteman Steel Mills, Inc.*, 253 NLRB at 320.

5. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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